Supreme Court, U.S.
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No. 92-281

IN THE

Supreme Court of the United States

October Term 1992

JAGDISH P. BERRY, *et al.*,

Petitioners,

v.

PROFESSIONALS, INC. and
PROFESSIONALS I, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether defendants should be absolved of Civil RICO liability because, in carrying out predicate acts of a RICO scheme, defendants also violated state criminal statutes?

(2) Whether a conflict among the Circuits is generated since the Court below held that relief granted at the trial court level constituted simply denial of Petitioners' counterclaim, and *not* equitable relief under RICO?

LIST OF PARTIES AND RULE 29.1 LISTING

Respondents adopt Petitioners' list of Parties and Rule 29.1 listing.

STATEMENT OF AFFILIATED PARTIES

Respondents Professionals, Inc., and Professionals I, Inc., have no parent or subsidiary corporations.

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OPINIONS AND JUDGMENTS BELOW

Respondents adopt Petitioners' references to Opinions and Judgments below.

JURISDICTION

Respondents adopt Petitioners' Jurisdictional Statement.

STATUTES INVOLVED

Respondents adopt Petitioners' Statement of Statutes Involved.

STATEMENT OF THE CASE

This action arose under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 USC § 1961, et seq., and resulted in a judgment by the trial court, sitting without a jury, in an amount in excess of $1.5 million. The District Court in this case made findings of fact, undisturbed by the Court of Appeals, which established that defendants undertook the following conduct which directly damaged plaintiffs. Defendants, having devised a scheme to defraud the plaintiffs, made numerous uses of the mail and wires in a violation of the mail and wire fraud statutes to induce investors to invest in a real estate development project, to bilk the investors by diverting the assets of the projects to defendants' coffers, to lull them into a false sense of security that the projects were being properly developed, and to divert an investigation by the plaintiffs and indeed by the court into their activities.

As part of the scheme of fraud, defendants made use of numerous artifices to divert the assets of plaintiffs to their own benefit, creating fictitious companies, embezzling funds, diverting corporate opportunities, paying themselves unauthorized salaries, etc. In order to divert suspicion, defendants created and mailed falsified corporate documents and even provided falsified documents to the Court.

As the District Court stated in its Remand Memorandum of Opinion and Findings of March 25, 1991:

> Each of the foregoing mailings was mailed with the intent to carry out some essential step in the execution of the "scheme to defraud" found by the court in its November 24, 1990 Memorandum Opinion. Many of the letters themselves do not disclose on their face that they were mailed in furtherance of the scheme to defraud; however, this is not

necessary if they were in furtherance of the scheme, which they were. Each separate mailing is a separate offense under 18 USC § 1341.

The seeking of contributions, holding of meetings, (false) advice as to the status of the corporations, and assurances of security were all in furtherance of the basic scheme. Each of the mailings constitute an act of "racketeering activity" as defined in 18 USC § 1961(1), and together they constitute more than the two such acts required for a "pattern of racketeering" under 18 USC § 1961(5). Moreover, these letters, as well as the telephone calls discussed later, were part of a continuous pattern which continued, right up to the time the Berrys were removed as officers of Beulah Corporation on October 9, 1988, and of the Greenbrier Corporation on December 11, 1988, furthering the goals of the scheme while attempting to forestall investigations by the plaintiff. ***This scheme and these acts caused and were designed to cause the damages sustained by the plaintiffs.*** They permitted the Berrys to obtain the assets of the plaintiffs, retain them, and forestall the plaintiffs' investigations by false assertions and threats.

As indicated, the acts were all related to the common scheme, and they continued until the Berrys were removed and even beyond. This action was filed on May 23, 1989. Had the fraud not been uncovered and laboriously pursued, there is no question that there would have been continuing criminal activity.

Appendix at pp. 17a-18a (emphasis added).

In its original Memorandum Opinion the District Court had found as follows:

> The court finds, as more specifically set forth in the attached findings, that the individual defendants, using the vehicle of the enterprise Greenbrier Corporation, embarked, in the development of that property, on a pattern of racketeering, including false invoices, forged checks, fictitious entities (Northern Virginia Construction, SBS Construction and General Construction Services), "flipping" the contract on Greenbrier Lot 9, cash disbursements ($23,000 without any supporting documents), and unauthorized and unrevealed loans, salaries and payments to the members of the Berry family for work not done and for which there is no supporting documentation, in order to drain off the profits of Greenbrier, and to present a picture of diminished profits to the stockholders. During and after this activity the defendants acted to cover up their activities by refusing the plaintiff-stockholders access to corporate books and records, altering the check register (which was the only source of financial information for the company's CPA), denying the stockholders information, filing lawsuits and suggesting that a witness lie. The plaintiffs were forced to go to the state court to secure access to the financial books and records. Even after issuance of an order for such access, the order had to be enforced through issuance of a show cause order for contempt.
>
> The RICO fraud was accomplished in part by the many letters and telephone calls between the individual defendants and the plaintiffs, clearly sufficient predicate acts for RICO. Moreover the rack-

> eteering activity was continuous, and there was clearly a relationship between the mailings and telephone calls and the fraud in that they were all designed to and did further the scheme and mislead the investors.
>
> * * *
>
> This is not a close case. The excesses of the defendants are so blatant as to be crude, and their sanctimonious protests in testimony that they had the plaintiff's best interest at heart are incredible, as are the glib explanation for the expenditures and disbursements.

Appendix at pp. 2a-4a.

In its accompanying Memorandum, the District Court enumerated the specific items of damage directly suffered by plaintiffs, and entered a judgment under RICO, trebling these sums. Appendix at 4a-6a. This judgment was affirmed by unpublished Opinion by the United States Court of Appeals for the Fourth Circuit. Appendix at 22a-30a.

ARGUMENT

The Petition for Writ of Certiorari should be denied. Defendants argue that this case presents legal issues relating to proximate cause of damages under RICO and whether equitable relief under RICO is available to private litigants. It does not. The decision below by the Fourth Circuit was an unpublished decision, carrying no precedential value.

Further, this was a heavily fact intensive case.[1] The Fourth Circuit Court of Appeals opinion did not create or purport to

[1]The District's Court original Findings of Fact which are not reproduced in Petitioners' Appendix were fifty-six pages long.

create new law. It merely applied existing law to the facts of the case.

Although petitioners strenuously attempted to urge the Fourth Circuit to construe some of the disposition entered by the District Court as "equitable relief" under RICO, the Fourth Circuit properly found the relief to have been simply a denial of petitioners' counterclaim and not relief under RICO[2]. The Fourth Circuit refused to even consider — much less decide — the issue of whether equitable relief was available under RICO.

A. Proximate Cause Issue

Petitioners set forth no compelling reason for this court to grant their Petition for Writ of Certiorari with respect to their alleged proximate cause issue. Indeed, in their argument petitioners concede that they did, through a pattern of racketeering activity, conduct numerous predicate acts over a lengthy period of time which they also concede "could fairly be said to have caused the injuries" suffered by Plaintiffs. Petition for Writ of Certiorari at 18. They concede that they were the perpetrators of the criminal activity and that plaintiffs suffered the damages for which relief was awarded. They contend however that because in conducting the fraud (which is a necessary ele-

[2]The District Court made the following observations concerning defendants' counterclaim:

> There was absolutely no evidence adduced on the counterclaim. Given the nature of the allegations in these claims, namely, fraud, embezzlement, libel, slander and implication of plaintiffs' counsel, it can only be viewed as a further attempt to intimidate the plaintiffs in order to discourage inquiry into the true nature of defendants' dealings. In the absence of any evidence to support the allegation, a Rule 11 inquiry is suggested. Because the RICO award is itself punitive, however, the court will not pursue this.

Appendix at p. 4a.

ment of the mail fraud and wire fraud statutes), they engaged in *other* criminal activity, such as embezzlement and common law fraud, this should relieve them from RICO liability. Their argument seems to be that where a plaintiff's damages are directly linked to *the fraud* perpetrated in furtherance of the mail fraud scheme rather than the mailing[3] itself, then plaintiffs shouldn't be able to recover damages under RICO. Petitioners seek solace from the recent case of *Holmes v. Securities Investor Protection Corp.*, ____ US ____, 112 S.Ct. 1311 (1992). In *Holmes* this court agreed with all of the circuits which had addressed the issue that proximate cause is necessary in order to award damages in a RICO action. Indeed this court cited *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988) as requiring proximate cause in the Fourth Circuit. The court below in this case cited the case of *Morley v. Cohen*, 888 F.2d 1006 (4th Cir. 1989) in its discussion of the proximate cause requirement. *Morley* in turn cited *Brandenburg* for that same proposition. Everybody agrees that proximate cause is necessary. There simply is no issue for this court to address.

Since this is an unpublished decision which simply applied existing law to the facts of this case, petitioners' seeking review here does not relate to any concern about global application of this case in future matters, but merely to their personal belief that by being subjected to RICO damages they have been personally wronged.

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[3]The mail fraud statute states: "Whoever, *having devised . . . any scheme . . to defraud*, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office . . . shall be fined not more than $1,000 or imprisoned not more than 5 years, or both". 18 USC § 1341 (emphasis added). Petitioners' argument is that if the injury actually results from the *fraudulent scheme* which is a portion of the mail fraud statute, damages cannot be granted if the fraudulent scheme includes violations of state criminal law. This is circular reasoning. If the fraudulent scheme, which is part of the mail fraud statute, causes the damage then the mail fraud causes the damage.

Petitioners also seek to suggest that because the *Holmes* decision was rendered shortly before the decision of the Fourth Circuit in this case, the court below must not have been aware of the *Holmes* decision[4]. The Holmes case was decided on March 24, 1992 and the panel decision below on April 2, 1992. A Petition for Re-hearing was filed by petitioners on April 16, 1992 and denied by the Fourth Circuit on May 13, 1992. Even if petitioners' speculation of the Fourth Circuit's lack of awareness of *Holmes* were true, there was plenty of time for that to be remedied during the period it considered Petitioners' Petition for Rehearing.

Further, petitioners' suggestion that the decision below was inconsistent with *Holmes* is incorrect. Both cases recognized the necessity of proximate cause in assessing damages. The *Holmes* court was concerned with "allowing suits by those injured only indirectly". *Holmes*, 112 S.Ct. at 1321, citing *Associated General Contractors of Cal., v. Carpenters*, 459 U.S. 519, 545 (1983). The *Holmes* court stated "we hold not that RICO cannot serve to right the conspirators wrongs, but merely that the non-purchasing customers or SIPC in their stead, are not proper plaintiffs." *Holmes*, 112 S.Ct. at 1321. In this case it is undisputed that the defendants were the ones who perpetrated the wrongs, that the wrongs caused damages, and that the plaintiffs were the ones harmed by the wrongs and who suffered the damages. *Holmes* does not change that. Accordingly there is simply no proximate cause issue for this court to address.

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[4]Since this case was argued on October 30, 1991 and the decision not issued until April 2, 1992, a fairer assumption would be that the Fourth Circuit was awaiting issuance of *Holmes* before releasing its decision, to ensure that *Holmes* did not conflict with it.

B. Equitable relief under RICO

Petitioners raise a straw argument which they wish this court to decide regarding the availability of equitable relief to private party litigants under RICO. The issue of whether equitable relief is available to private parties under RICO was not decided by the Court of Appeals opinion below. Accordingly there is again no issue for this court to address.

Petitioners argued strenuously and valiantly to the Fourth Circuit that the denial of the relief requested by them in their counterclaim ought to be construed as equitable relief under RICO on the main complaint and that the relief should be reversed as impermissible in private RICO litigation. The fallacy in petitioners' position before this Court is that the Fourth Circuit *refused* plaintiffs' invitation and specifically declined even to address this issue, much less issue a decision which is in conflict with other circuit courts. In fact, Petitioners are urging this Court to address an issue — the availability of equitable relief to private parties under RICO — which was *not* decided or addressed by the Fourth Circuit and which was *not* decided or addressed by the District Court. Plaintiffs' Petition for Writ of Certiorari on this issue is simply wishful thinking on their part that the Fourth Circuit had in fact addressed the issue.

The novelty of Petitioners' argument, as noted by the Court below, is revealed by the following. The portion of the District Court's order which Petitioners contend constitutes equitable relief under RICO is contained in the following paragraph:

> 3. The defendants' interest in Professional I, Inc., is declared to be limited to $50,000.00, and in Professionals, Inc., to $55,000.00, and that the 30% fee is declared not to be owed Berry Associates or A.J., Inc.

Appendix at 7a.

In their counterclaim, Petitioners sought as relief both recovery of amounts allegedly invested over and above $105,000 plus a "development fee" of 30%. That paragraph 3 of the District Court's Order is a denial thereof is plain on its face. Petitioners apparently concede that the rejection of the 30% development fee is denial of their counterclaim, but suggest that the District Court in its paragraph 3 intended to be *granting* plaintiffs' equitable relief under RICO in the first part of its sentence, and *denying* petitioners relief requested in their counterclaim in the last part. It makes far more sense to read the entire sentence as a denial of relief sought by the counterclaim.

The Fourth Circuit's resolution of this issue was as follows:

> In their counterclaim, the Berrys alleged RICO and state law violations and sought various remedies including payment of the 30 percent development fee for the sale of the Beulah Road property. In addition to the return of their capital contributions, the Berrys also demanded that Professionals return approximately $1,500,000 allegedly invested in or earned through the development of the properties. The district court correctly dismissed the counterclaim, finding that the development fee was not owed to the Berrys and determining that the Berrys' interest in the properties was $105,000 the amount they originally invested. Raising the novel argument that dismissal of their counterclaim amounted to a grant of equitable relief to Professionals, the Berrys challenge the order of dismissal as beyond the power of the court. We find this argument to be without merit. The district court simply denied the Berrys the relief they requested.

Appendix at 30a.

However interesting the issue may be when it does arise in the proper case as to whether private equitable relief is permissible under RICO, this simply is a case as to which that issue has not been confronted either at the Distic' Court's level[5] or the Fourth Circuit. Accordingly, were this court to address the issue it would be for the first time in this case, and constitute nothing more than an advisory opinion.

C. Conclusion

The unpublished decision below does not address any new issues of law. There is no sound basis for this Court to grant the Writ of Certiorari. It should be denied.

Respectfully submitted,

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[5]Indeed defendants did not even argue before the District Court that equitable relief under RICO is not permissible, even though as they now point out to this court equitable relief was sought by plaintiffs. Having failed to raise this argument at the trial level, it should be deemed waived.